From: moore@cs.utk.edu@inetgw
To: Microsoft ATR
Date: 1/28/02 5:41pm
Subject: Microsoft Settlement

[Text body exceeds maximum size of message body (8192 bytes). It has been converted to attachment.]

CC: moore@cs.utk.edu@inetgw

This letter is intended as public comment, as provided for by the Tunney Act, on the proposed settlement in United States vs. Microsoft.

The proposed settlement should not be accepted for the following reasons:

- The proposed settlement does not provide an adequate remedy for Microsoft's abuses of its monopoly position.

- Rather than increasing competition, the proposed settlement appears to be specifically tailored to discourage certain kinds of competition against Microsoft

- The proposed settlement fails to redress the harm done by Microsoft's illegal abuses of its monopoly position.

- The proposed settlement is likely to strengthen Microsoft's position in the marketplace, thereby worsening the situation for consumers caused by a lack of competition..

- The proposed settlement encourages Microsoft to use its monopoly position in the desktop market to obtain monopolies or drastically increase its market share in other markets.

1. The proposed settlement does not provide an adequate remedy for Microsoft's abuses of its monopoly position.

The proposed settlement specifies several prohibitions and limitations on Microsoft's future behavior. However for the most part these limitations are narrowly tailored to provide remedies for specific features of the Government's complaint of May 1998. Market conditions have changed drastically since that time, due in large part to illegal anticompetitive practices by Microsoft.. There are no longer any credible competitors to Microsoft in the market for desktop operating systems for Intel-compatible personal computers. Microsoft's Internet Explorer has largely succeeded in displacing Netscape's web browser and other web browsers. And while Java has proven to be a very useful programming language in many respects, Java's run-time environment has not become a "virtual operating system" which could support the same applications on a variety of computing platforms, and which could thereby threaten its monopoly on the desktop. These developments were significantly furthered by Microsoft's anticompetitive actions both before and after the government's complaint was filed.

Conditions in these markets change so quickly that the problems caused by Microsoft's monopoly simply cannot be addressed after-the-fact, or by specific prohibitions on Microsoft's future behavior that are narrowly tailored to constrain its previous behavior. Furthermore, previous settlements of this type have proven to be ineffective at curbing Microsoft's abusive practices.

2. Rather than increasing competition, the proposed settlement appears to be specifically tailored to discourage certain kinds of competition against Microsoft

The proposed settlement is also inadequate because it appears to be specifically tailored to discourage certain kinds of competition - in particular, efforts by both commercial and noncommercial parties to make alternatives to Microsoft's products freely available to the public. For instance:

- The settlement prohibits Microsoft from retaliating against OEMs for shipping a personal computer which includes both a Microsoft operating system and a non-Microsoft operating system, but it does not prohibit retaliating against an OEM for shipping a personal computer which does not include an operating system, or which includes only a competing operating system.

Computer purchasers who intend to use alternative operating systems
(which are often superior to Microsoft's products for certain
purposes as well as being available at no cost) are often forced to
purchase a copy of a Microsoft operating system, which they never
use, with each new computer purchase. Microsoft has effectively
managed to impose a "tax" on the sale of most new personal computer
systems (particularly "laptop" computer systems).   The proposed
settlement does nothing to redress that problem.

- The provision of the settlement requiring Microsoft to disclose
  APIs and related documentation, presumably via the Microsoft
  Developer Network (MSDN), allows Microsoft to impose nearly
  arbitrary conditions on the use of that information, to prevent
  potential competitors from using that information to produce products
  that compete with Microsoft operating systems and middleware.

  In addition, in the past such documentation as has been provided
  by Microsoft via MSDN has often proven insufficiently detailed to
  allow other parties to write equivalent interfaces.

  Finally, nothing in this proposed settlement prevents Microsoft
  from shipping APIs which provide undocumented features, and
  documenting and using those features at a later time. This would
  make its competitors' deployed operating system and middleware
  products incompatible with programs written to the latter API
  specification.

  Because of these flaws, this provision is unlikely to be effective
  at furthering competition.

- The provision which requires Microsoft to document communications
  protocols applies to "client computer[s]" only. Presumably this
  requires only that Microsoft document the "client" side of such
  protocols, allowing Microsoft to hold more closely the documentation
  of the "server" side of a protocol, and allowing Microsoft a
  competitive advantage over providers of servers which communicate
  with those clients - particularly those using "open source" server
  platforms such as Linux which have provided significant competition
  to Microsoft products in the server market.

- The provision which allows Microsoft to use Microsoft middleware in
  preference to a competitor's middleware when the competitor's
  middleware "fails to implement a reasonable technical requirement
  (e.g. the requirement to be able to host a particular ActiveX
  control)" effectively gives Microsoft license to bypass competitors'
  middleware at will, by declaring as part of the settlement that
  addition of any ActiveX control to a middleware interface is
  inherently a reasonable technical requirement. For the settlement
  to be effective, Microsoft cannot be allowed to change its
  programming interfaces at will.

- The requirement to Microsoft to license intellectual property rights
  "on reasonable and nondiscriminatory terms" that are needed to
  exercise options under the agreement, because of presumptions on
  what is "reasonable", effectively allows Microsoft to set the bar
  on access to such information high enough to exclude "open source"
  and noncommercial competitors.

- Similarly, the provision which allows Microsoft to require that the
  licensee of any of its intellectual property have a "reasonable
  business need" would likely allow Microsoft to exclude noncommercial
  competitors. The fact that the only significant competition to
  Microsoft in many markets comes from noncommercial parties makes
  a presumed requirement of "reasonable business need" for access
  to such information inherently favorable to Microsoft and
  unreasonable as part of a remedy.

2. The proposed settlement fails to redress the harm done by
   Microsoft's illegal abuses of its monopoly position.

Due in large part to Microsoft's illegal anticompetitive practices,
Microsoft has obtained a monopoly in several markets, including
desktop operating systems, web browsers, and office productivity
software. The harm done is a considerably more than to limit consumer
choice, stifle innovation, and artificially inflate prices.
Microsoft's monopoly has also forced consumers to accept operating
system and networking software which are dangerously insecure and have
been compromised on numerous occasions by computer viruses. Many of
these vulnerabilities are a direct result of Microsoft decisions to:

- Disregard Internet standards for the labeling of content
  transmitted over the network, thereby bypassing the requirement
  for security review that was designed into that mechanism. This
  was done in order to allow arbitrary content to be interpreted by
  applications on Microsoft operating systems, and to provide
  Microsoft with an advantage over competitors' operating systems that
  used other means to label content.

- Provide a means for their document formats to contain executable
  content with the ability to perform any function available to
  any application on the host computer - including the ability to
  delete and alter arbitrary files and the ability to send network
  traffic impersonating the computer's owner - in order to give
  Microsoft applications an advantage over competitors' products.

- Impose weak means of authenticating users over a network, for
  the sake of backward compatibility with Microsoft products.

Even if a settlement provided an effective curb on Microsoft's future
behavior, to be acceptable it would also need to redress the
considerable harm done by past abuses. Injured parties include not
only purchasers of Microsoft software (and computers which were
supplied with Microsoft software) but also the numerous institutions
who have suffered damage due to such vulnerabilities, and operators of
public and private Internet networks whose operations have been harmed
by the traffic generated by viruses transmitted by Microsoft software.
To be effective, a remedy would need to redress these injuries without
further strengthening Microsoft's position in the market.

3. The proposed settlement is likely to strengthen Microsoft's
   position in the marketplace, thereby worsening the situation
   for consumers caused by a lack of competition.

By imposing essentially no penalties on Microsoft and few limitations
on its behavior, the proposed settlement would signal to Microsoft and
its competitors that anticompetitive behavior is largely "safe".

The proposed settlement would also provide Microsoft with the means to
discourage certain kinds of competition, particularly "open source" or
noncommercial products, allowing it to further limit consumer choice.

4. The proposed settlement encourages Microsoft to use its
   monopoly position in the desktop market to obtain monopolies
   or drastically increase its market share in other markets.

By focusing largely on the desktop or client market, the settlement
ignores Microsoft's ongoing efforts to leverage its existing
monopolies to obtain monopolies in other markets. Furthermore,
because different kinds of computers communicate with one another over
a network, Microsoft's monopoly on desktop operating system software
can be a powerful coercive force over other markets - for instance,
media players and mechanisms for protecting intellectual property
transmitted over a network.

There is no significant difference between the tactics that Microsoft
used to take over the operating system, web browser, and office
productivity software markets, and the tactics that Microsoft is
currently using to attempt to establish control over other markets.
Any remedy which allows Microsoft to use its control over the desktop
to favor its own solutions in any way cannot be considered adequate.

For the reasons stated above, I recommend that the Court reject the
proposed settlement.

An effective remedy would require

- Microsoft to be pro-actively prevented from future abuse,
- Competition to be re-introduced in the markets in which Microsoft has
  a monopoly and which it has shown abusive behavior,
- Compensation for injuries caused by Microsoft's anticompetitive
  behavior

It is difficult to understand how such a remedy could be effected
without either:

- Active government regulation of Microsoft's behavior, and in
  particular affirmative prior approval of all new and revised Microsoft
  products prior to release, and approval of contracts between Microsoft
  and other parties before they become effective, or

- Structural reorganization of Microsoft into two or more competing
  entities

and without significant financial compensation to injured parties.

Keith Moore